Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-12-116 OF 1998
KC VOHRAH J
18 OCTOBER 1999

Companies and Corporations — *Receivership — Power of receivers —Power to commence summons after liquidation — Whether liquidator can delegate such power to receivers and managers*

The plaintiff company, under liquidation, sued the defendants on a loan. The action was commenced via Ler Cheng Chye and Lum Tuck Cheong — the plaintiff's receivers and managers — who claimed to have derived their authority to initiate the proceeding from the liquidator. The defendants applied to strike out the summons. The issues were whether: (i) the purported receivers and managers had any power in law to commence the action after liquidation had been ordered in respect of the plaintiff; and (ii) the liquidator had power to appoint Ler Cheng Chye and Lum Tuck Cheong who prior to the liquidation of the company were receivers and managers collecting the debts of the company, to be receivers and managers of the company.

Held, dismissing the appeal:

(1) The persons who purported to be receivers and managers of the plaintiff company had no power to commence the summons after liquidation had been ordered in respect of the company (see p 728D); *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Sdn Bhd & Ors* [1977] 3 MLJ 805 followed.

(2) Ler Cheng Chye and Lum Tuck Cheong ceased to be receivers and managers of the company upon the order of winding up made in respect of the company and to cite the name of the plaintiff and state '(Dalam Pembekuan) (Penerima dan Pengurus dilantik)' in the summons is clearly not correct. The power of instituting any suit is at the discretion of the liquidator — the power is his and he cannot delegate it (see p 728E).

[Bahasa Malaysia summary

Syarikat plaintif, yang dalam penyelesaian, telah mendakwa defendan berdasarkan satu pinjaman. Tindakan dimulakan melalui Ler Cheng Chye dan Lum Tuck Cheong — penerima dan pengurus plaintif — yang mendakwa memperolehi kuasa untuk memulakan prosiding itu daripada penyelesai. Defendan-defendan telah memohon untuk membatalkan saman itu. Isu-isu adalah sama ada: (i) penerima dan pengurus yang dimaksudkan mempunyai apa-apa kuasa di sisi undang-undang untuk memulakan tindakan selepas penyelesaian telah diperintahkan berkenaan dengan plaintif; dan (ii) penyelesai

tersebut mempunyai kuasa untuk melantik Ler Cheng Chye dan Lum Tuck Cheong yang mana sebelum penyelesaian syarikat tersebut merupakan penerima dan pengurus yang mengutip hutang syarikat tersebut, menjadi penerima dan pengurus syarikat tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Orang-orang yang dimaksudkan sebagai penerima dan pengurus syarikat plaintif tidak mempunyai kuasa untuk memulakan saman tersebut selepas pembubaran telah diarahkan berkenaan dengan syarikat tersebut (lihat ms 728D); *Kimlin Development Sdn Bhd v Bank Bumiputra (M) Sdn Bhd & Ors* [1977] 3 MLJ 803 diikut.

(2) Ler Cheng Chye dan Lum Tuck Cheong tidak lagi menjadi penerima dan pengurus syarikat itu apabila perintah untuk penggulungan telah dibuat berkenaan dengan syarikat tersebut dan untuk menyatakan nama plaintif dan menyatakan '(Dalam Pembekuan)(Penerima dan Pengurus dilantik)' di dalam saman itu adalah dengan jelas tidak betul. Kuasa untuk memulakan apa-apa tindakan guaman adalah pada budi bicara penyelesai — kuasa itu adalah kuasa beliau dan beliau tidak boleh menugaskan kuasa itu (lihat ms 728E).]

Notes

For cases on receivership generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 366–416.

Cases referred to

Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Sdn Bhd & Ors [1977] 3 MLJ 805 (folld)

Sowman v David Samuel Trust Ltd [1978] 1 All ER 616 (refd)

Legislation referred to

Companies Act 1965 ss 236(a), 236(2)(i), 300(1)

MY Goh (*Iza Ng Yeoh & Kit*) for the appellant.

VS Chan (*K Gauri* with him) (*Lee & May*) for the respondent.

KC Vohrah J: The plaintiff company, under liquidation, sued the three defendants on a loan. The plaintiff company is a limited company. The plaintiff in the summons in the sessions court is cited as follows:

> Kosmopolitan Credit & Leasing Sdn Bhd — Plaintiff
> (Dalam Pembekuan)
> (Penerima dan Pengurus dilantik)

The title shows that the plaintiff is being wound up and that a receiver and manager (or receivers and managers) had been appointed to commence this summons.

A The summons was filed on 2 March 1992 and the three defendants filed an application to strike out the summons. The ground relied on is that an order for the winding up of the plaintiff had been made on 16 May 1991 and that a liquidator had been appointed. This was raised in the defences of the three defendants and the affidavit by one of them. The affidavit referred to a letter by the previous firm of solicitors of the plaintiff stating that the B solicitors were acting on the instruction of the receivers and managers and that the receivers and managers 'have derived their authority to initiate the above proceeding from the liquidator.'

In his affidavit in reply, Ler Cheng Chye stated he and Lum Tuck Cheong were appointed to claim the debts of the plaintiff before the C winding up as receivers and managers and that after the winding up, they were given the power by the liquidator to continue with the claims against the debtors of the company.

Since there were no grounds of decision given by the sessions court judge as this is an appeal from an interlocutory decision, it is not clear on what ground the judge of the sessions court made his decision to strike out D the summons.

And I have to look afresh on the issues raised and they are basically two of them:

(1) whether the purported receivers and managers had any power in law to commence this action after liquidation had been ordered in respect E of the plaintiff; and

(2) whether the liquidator had power to appoint Ler Cheng Chye and Lum Tuck Cheong who prior to the liquidation of the company were receivers and managers collecting the debts of the company, to be receivers and managers of the company.

F As regards the first question, the answer is provided by the Federal Court case of *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Sdn Bhd & Ors* [1977] 3 MLJ 805 in relation to s 300(1) of the Companies Act 1965 contrasting it with the position obtaining in United Kingdom. First, Edgar Joseph Jr FCJ delivering the judgment of the court stated the position G in United Kingdom citing:

> In the United Kingdom because a receiver has all or substantially all the assets of the company under his control by reason of the security created by the debenture and retains the power to manage and to release those assets, a liquidator is obliged to stand on the sidelines in the course of receivership.

H Edgar Joseph Jr FCJ cited as an example the case of *Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616:

> In *Sowman v David Samuel Trust Ltd*, the Land Office had refused to register conveyances of property executed by the receiver alone after the company had gone into liquidation. Gouldring J held that a power of attorney conferring upon receivers power to do various acts and, in particular, to execute I conveyances in the name of the company survived the winding up. His Lordship went further and indicated (at p 31) that the power of attorney ploy may be otiose because the receiver's general powers of realization also survive

> the winding up, even though he loses his right to act as the company's agent in such a situation. In other words, his powers of realization exist independently of his authority to bind the company as its agent.

Edgar Joseph Jr FCJ then dealt with the Malaysian position:

> The position in this country is different. Because a receiver and manager of any part of the undertakings of the corporation appointed under a power contained in any instrument is by definition(see s 4(1)(b) of the Act) an officer of the corporation and all officers of a corporation whether past or present, are obliged under pain of prosecution under s 300(1) of the Act, to deliver up to the liquidator appointed by the court or as he directs: (i) all the moveable and immovable property of the corporation in his custody or under his control; or (ii) all books and papers in his custody or control belonging to the corporation, being by law required to deliver up the same (see s 300(1)(b)(i) and (ii)), the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding up, since there is no estate for the receiver and manager to administer.

I am bound by the decision and the answer to the first question is that the persons who purported to be receivers and managers of the plaintiff company had no power to commence the summons after liquidation had been ordered in respect of the company.

As for the second question, I am puzzled as to how the liquidator could have appointed Ler Cheng Chye and Lum Tuck Cheong as receivers and managers. Where did he derive such a power? Ler and Lum ceased to be receivers and managers of the company upon the order of winding up made in respect of the company and to cite the name of the plaintiff and state '(Dalam Pembekuan) (Penerima dan Pengurus dilantik)' is clearly not correct or relied. The power of instituting any suit is at the discretion of the liquidator (see s 236(a)) — the power is his and he cannot delegate it. Although a general provision, s 236(2)(i), allows a liquidator to appoint an agent to do any business, it is for business which the liquidator is unable to do himself, but that cannot override the specific provision of s 236(2)(a) giving him power 'to bring or defend any action or other legal proceeding in the name of or on behalf of the company.'

I see no merit in the appeal. Appeal dismissed. Lum and Ler to pay the costs.

Appeal dismissed.

Reported by Loo Lai Mee